

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 63473-9-I
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
KEVIN E. DEAN,)	
)	
Appellant.)	FILED: July 26, 2010
)	

Appelwick, J. — Dean and Mullen were convicted of stealing from their employer, Frontier Ford. The theft was based on the manipulation of accounting records at the business and use of the business accounts to purchase items. Mullen also resold items purchased with business accounts, resulting in a criminal profiteering conviction. Dean appeals the trial court’s order that he pay restitution for the thefts found by the jury to serve as predicate acts for Mullen’s criminal profiteering conviction. Finding sufficient connection to Dean’s conspiracy to commit theft, we affirm.

FACTS

In a previous unpublished opinion resulting from Lisa Mullen and Kevin Dean’s appeals from their convictions, this court set forth the following facts:

According to testimony at trial, Lisa Mullen became the office manager of Frontier Ford in 1992. One of her responsibilities was to keep

the dealership's account books. Frontier Ford's owner, Ron Rennebohm, hired Kevin Dean in 1996 to be the dealership's general manager. Within months after Dean was hired, he and Mullen began a romantic relationship and eventually lived together for a time.

Mullen and Dean were observed spending a significant amount of time together each month in the office, going over Frontier Ford's financial statements. Mullen's wardrobe changed dramatically. She told co-workers that she earned a lot of money buying and selling items on eBay, implying that explained how she could afford expensive designer clothes. When another employee complained to Dean about Mullen spending so much time on eBay, he told the employee to do her own work and forget about Mullen and eBay.

By late 2001, Rennebohm's wife suspected that Mullen was stealing from Frontier Ford. In early 2002, Rennebohm hired a consultant to look over the operations and soon brought him on as the corporate general manager. As a result of discussions with the new manager, Rennebohm fired Dean in late May 2002. Mullen commented to another employee, "I may be next." Rennebohm called Rick Rekdal, his long-time personal and business accountant from the Seattle firm of Clothier and Head, and asked him to look over the financial books and records to find out whether money was "leaving the store." Aware that the accountant would soon be arriving, Mullen made an appointment to talk to Rennebohm privately. Rennebohm testified that during this conversation, Mullen admitted she had been stealing from him and told him "it snowballed" on her. She said she had a rental house that she would sell to pay the money back, but if he fired her, "she could never pay us back." Referring to money Dean had borrowed from the company, Rennebohm said he asked Mullen "did he ever pay that \$60,000 back that you said that he did." Mullen responded that Dean did not pay it back and in fact owed another \$200,000.

After this conversation Rennebohm reported his suspicions to the Anacortes police and an investigation ensued. Rekdal and his staff spent weeks tracing transactions posted on the books of the dealership and discovered that Mullen had been responsible for manipulating the accounts for the benefit of herself and Dean. The State filed first degree theft and other related charges against Mullen and Dean. The police investigators did not have sufficient skills to establish how much had been stolen, so in 2003, the Skagit County prosecutor hired Rekdal for that purpose.

More than three years elapsed before the case went to trial in January 2006. The joint trial of Dean and Mullen took up the entire month of January. Frontier Ford employees testified that Rennebohm relied

upon Mullen and Dean to run Frontier Ford. Rennebohm did not come to the dealership every day, but even when he did, he did not look closely at the account books. He did not even have a password to log on to the computer. Mullen was the only person at the dealership who had access to all of the databases in the computer, giving her the ability to hide her transactions.

Mullen's yearly salary at Frontier Ford never exceeded \$77,000, but a variety of merchants established that she bought thousands of dollars worth of clothing, jewelry, and other goods unrelated to the auto business using Frontier Ford checks. For example, she spent more than \$27,000 at a clothing boutique in Seattle in one year and spent \$14,925 in one day at a store in Palm Desert, California.

Rennebohm testified that he trusted Mullen and Dean to run the dealership. He denied that he authorized them to spend dealership money for their personal expenses.

Rekdal's testimony explained how, through the use of a complex system of draws and balance transfers, Mullen was able to write checks that benefited her and Dean personally without being detected. According to Rekdal's testimony, the total amount of money that left Frontier Ford in this manner for nonbusiness purposes was \$1.2 million over a six-year period.

In her defense, Mullen acknowledged spending the dealership's money, but claimed that everything she did at Frontier Ford had been authorized by Rennebohm. She testified that over the years she had loyally followed Rennebohm's instructions to assist him in "cooking the books" and hiding profits from his ex-wife, the government, a former business partner, and employees such as Dean whose salaries depended on the company's profits. She said he told her that her assistance had helped him to make "millions." According to Mullen, Rennebohm approved of her spending the company's money on Dean's behalf as a means of retaining him because he was an extremely talented manager. She said the jewelry and other personal items she purchased with corporate checks were approved by Rennebohm, either as gifts that he intended to give to others, or as a reward to her for keeping quiet about his own bad acts, and in keeping with his insistence that his employees present a nice image. Mullen testified that she met with Rennebohm when she heard the accountants were coming for the sole purpose of asking him what he wanted her to tell them.

Dean did not testify. His defense theory was that he was unaware of Mullen's misappropriation of the dealership's funds and that he did not benefit from her acts.

On February 7, 2006, the jury brought in a verdict convicting both defendants of theft in the first degree^[1] and conspiracy^[2] to commit theft in the first degree. Mullen was also convicted of criminal profiteering based on the evidence that she was buying and reselling merchandise through eBay.^[3] The defendants filed motions for a new trial that were heard in November 2006 [and subsequently denied].

State v. Mullen, noted at 152 Wn. App. 1048, 2009 WL 3418537, at *1–*4 (footnotes omitted), review granted, 168 Wn.2d 1035, 230 P.3d 1062 (2010).⁴

The following additional facts relate to the restitution proceedings. At the

¹ Former RCW 9A.56.030(1) (2001) states,

(1) A person is guilty of theft in the first degree if he or she commits theft of:

(a) Property or services which exceed(s) one thousand five hundred dollars in value other than a firearm as defined in RCW 9.41.010.

RCW 9A.56.020(1)(a) defines “theft” as, “To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.”

² RCW 9A.28.040(1) states, “A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in pursuance of such agreement.”

³ Mullen was found guilty of use of proceeds of criminal profiteering to establish and operate an enterprise. RCW 9A.82.080(1)(a) states:

It is unlawful for a person who has knowingly received any of the proceeds derived, directly or indirectly, from a pattern of criminal profiteering activity to use or invest, whether directly or indirectly, any part of the proceeds, or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

As a predicate to this crime, Mullen was found guilty of trafficking in stolen property in the first degree. RCW 9A.82.050(1) states, “A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.”

⁴ Both Mullen and Dean have filed petitions for review in the Washington State Supreme Court. Mullen’s petition has been granted. Mullen, 168 Wn.2d 1035, 230 P.3d 1062 (2010). As of July 12, 2010, Dean’s petition is pending. Case no. 83981-6.

hearing, the State relied on accountant Rekdal's trial testimony to support its request for restitution in the amount of \$1,271,130. Part of that amount included several acts of theft which served as predicate acts in Mullen's criminal profiteering charge, found by the jury in a special verdict, totaling \$241,458. Mullen provided the only testimony at the hearing. Dean declined to testify. In a prehearing memorandum, Dean made arguments relating only to why the evidence at trial failed to prove that Dean had actually committed theft. He challenged Rekdal's testimony, arguing that Rekdal had failed to calculate how much Frontier Ford owed Dean during the conspiracy period. Such calculations would have required the accountant to calculate Dean's proper earnings, including the true profits of the company and to determine which, if any, draw checks were authorized.

The trial court ordered restitution in the amount of \$241,458. The court concluded that the only easily ascertainable loss causally connected to the crimes for which the defendants were convicted were those thefts found by the jury as predicate acts for Mullen's criminal profiteering conviction. The trial court found that Dean was liable as a coconspirator for all damages caused by the conspiracy to commit theft, regardless of his knowledge or complicity in the particular injury. The court ordered that liability for restitution be joint and several. The trial court later modified the order to include an additional \$25,000 in investigative costs.

Dean appeals.

DISCUSSION

Dean contends the sentencing court erred by ordering restitution for damages not causally connected to the crime of conviction. A sentencing court's authority to

order restitution is purely statutory and, where so authorized, the sentencing court has discretion to determine the amount of restitution. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). The exercise of such discretion is reversible only where it is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Kisor, 68 Wn. App. 610, 619, 844 P.2d 1038 (1993).

RCW 9.94A.753(3) states in part: “[R]estitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.” Also, restitution “shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” RCW 9.94A.753(5). These statutes impose a broad responsibility on offenders to pay restitution. State v. Hiett, 154 Wn.2d 560, 565, 115 P.3d 274 (2005).

Restitution is allowed only for losses that are causally connected to a crime and may not be imposed for a general scheme, acts connected with the crime charged, or uncharged crimes unless the defendant enters into an express agreement to pay restitution in the case of uncharged crimes. State v. Kinneman, 155 Wn.2d 272, 286, 119 P.3d 350 (2005). A sufficient causal connection exists if, but for the criminal acts of the defendant, the victim would not have suffered the damages for which restitution is sought. Hiett, 154 Wn.2d at 568. The prosecution bears the burden of establishing a sufficient causal connection by a preponderance of the evidence. State v. Dedonado, 99 Wn. App. 251, 256, 991 P.2d 1216 (2000).

Dean alleges that causation is not proven in this case. Dean was not convicted of criminal profiteering or of conspiracy to commit criminal profiteering. Dean is correct

that to the extent any losses are attributable *only* to Mullen's criminal profiteering, Dean cannot be liable. Kinneman, 155 Wn.2d at 286. Dean alleges that because the trial court determined that the only easily ascertainable damages were proven in respect to charges against Mullen alone, the court necessarily found that there were no easily ascertainable damages for either of Dean's convictions. We disagree.

Dean may be held liable for all losses caused by the conspiracy to commit theft. In State v. King, this court held that a person convicted of a conspiracy should be ordered to pay restitution for any injuries caused by the conspiracy, regardless of the defendant's complicity in the particular injury. 113 Wn. App. 243, 300, 54 P.3d 1218 (2002). Dean argues that King was wrongly decided. We find no cause to question the validity of King.

In determining whether a causal connection exists, we look to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea. Hiett, 154 Wn.2d at 568. We hold that the trial court did not abuse its discretion in finding that a causal connection existed between the thefts supporting Mullen's conviction for criminal profiteering and Dean's conviction for conspiracy to commit theft.

Criminal profiteering is defined in RCW 9A.82.010(4). It includes theft under RCW 9A.56.030, and conspiracy to commit theft, of which Dean and Mullin were convicted. RCW 9A.82.010(4). The State alleged 23 specific acts of theft totaling some \$241,000 and two specific acts of money laundering against Mullen. The acts of theft are attributable to the conspiracy charges as well as Mullen's criminal profiteering charge. Mullen was convicted under RCW 9A.82.080 of using proceeds of criminal

profiteering to establish and operate an enterprise. The jury found \$241,458 in thefts attributable to Mullen's criminal profiteering charge in a special verdict. These thefts are attributable to the conspiracy to commit theft, of which Dean was convicted. They occurred within the time frame of the conspiracy to commit theft conviction, June 1996 to July 2002. The fact that the acts also served as predicates for the criminal profiteering charge against Mullen does not prevent them from also serving as predicates for restitution for Dean's conspiracy to commit theft conviction.

The court did not abuse its discretion in ordering restitution. We affirm.

Appelwick, J.

WE CONCUR:

Edenfor, J.

Cox, J.